SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 283

JOHN LOWELL HANNAH, JOHN JERALD HANNAH, and BILLY ARCH HARDAWAY, *Petitioners*

v.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on May 2, 1968.

OPINIONS BELOW

The United States District Court for the Northern District of Texas in which Petitioners were convicted on June 14, 1967, and which on June 19, 1967, over-

ruled Petitioners' Motion for Judgment of Acquittal and for New Trial rendered no written opinion. That Court's oral expressions are at pp. 310 et seq., of the Record.

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on May 2, 1968. That Court's opinion has not yet been reported; but is printed in appendix hereto. Petitioners' Petition for Rehearing and for Rehearing En Banc were denied on June 11, 1968, and that judgment has not been reported but is printed in appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit made and entered May 2, 1968, with judgment denying rehearing entered June 11, 1968, are appended to this Petition in the appendix at pp. 1a to 2a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Defendants were entrapped into violations of the Internal Revenue laws and apprehended while moving non-tax paid spirits from Oklahoma to Texas. Being charged with violations of Title 26, U.S.C. Sections 5205(a)(2) and 5604(a)(1) they were convicted and sentenced to imprisonment in the U. S. D. C. for Northern District of Texas and their convictions were affirmed by Court of Appeals. The question presented is:

1. Is the Issue of Entrapment a Question for the Court or the Jury?

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

The only statutes involved are the Internal Revenue sections which Petitioners allegedly violated. They do not bear upon the question before this Court herein. Nor are we aware of other Rules or Regulations which are at issue. The whole matter of entrapment seems to be a judicial question.

STATEMENT

The Petitioners are Ozarkians resident at Pickens in McCurtain County in Southeastern Oklahoma. John Lowell Hannah is the father of John Jerald Hannah and father-in-law of Billy Arch Hardaway. John Lowell had been convicted of having a half gallon of liquor in 1942. The other Petitioners had no record of such violations. In October 1966 John Lowell was working at a sawmill. John Jerald was working in a city but became ill and returned to the mountain country in November of 1966. Hardaway had worked for a large lumber company since 1965.

In October 1966 an Alcohol Tax Unit Investigator, Smith, came into the mountains bringing Scud McKinney. Scud had a relative who was a friend of Petitioners. Scud represented that he was old and crippled and broke and poor and had suffered a series of misfortunes. His business was bootlegging at Ada (about one hundred miles distant) but he had lost his source of supply and if he could get a supply he (Scud) could get back on his feet. Smith was introduced as Scud's wife's nephew (he was not) and chauffeur.

Scud's predicament evoked great sympathy among the mountain folk and Hardaway who had never made or sold whiskey obtained a half gallon from John

Lowell to whom it had been given about a week before, and let Scud have it.

From this time on Scud's "nephew" and "driver" who was really a revenuer, never let up on Hardaway and then on John Lowell and finally on John Jerald Hannah in efforts to obtain whiskey. These Petitioners did obtain and sell to Smith increasing quantities for a period in excess of a month, during which time another revenuer was introduced into the play posing as a syndicate man. The Petitioners, naive mountain people, looked down Easy Street toward a promised land of Hawaiian vacations and great affluence.

As a grand finale Petitioners were induced to load 750 gallons of white lightning in a U-Haul truck and take off for Dallas to supply the syndicate for the Christmas trade. On December 21, 1966, near Dallas, Smith met them to take them to a barn where the Syndicate would take over. When they got to the barn and started unloading, the place was teeming with officers.

There was absolutely no evidence except for John Lowell Hannah's 1942 conviction over a half gallon that any of the Petitioners were making, selling, or transporting moonshine until Scud and Smith came in evoking, at first, sympathy for Scud to obtain a little liquor and then pointing out future riches to obtain greater quantities.

Petitioners maintain that upon such facts, the Court should have found entrapment as a matter of law and should have directed an acquittal. This should have been done because of what the law of entrapment is or should be and should also have been done under the general rules that a Court must order acquittal when

there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt.

In the instant case, even if entrapment were a question for the jury as the lower courts held herein, we think no reasonable mind could have fairly concluded guilt beyond a reasonable doubt under the instructions the Court gave.

Another important matter in this case is that the Petitioners John Lowell Hannah and Hardaway are under indictment in the United States District Court for the Eastern District of Oklahoma for sales in Oklahoma to Revenue Agent Smith, allegedly occurring on November 9, 16, 26 and December 2, 1966. These were the sales prior to the big shipment to Dallas. Trial of these indictments has been postponed awaiting eventual outcome of the instant conviction in Texas. Oklahoma is in the Tenth Circuit.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below was based on its opinion in the case of *Kivette* v. *United States,* 5 Cir. 1956, 230 F.2d 749 which held that whether a defendant was lured by the agent into a crime or was merely afforded a safe opportunity to commit it was one of fact for the jury to decide.

This is in conflict with the separate opinion of Justice Roberts concurred in by Justices Brandeis and Stone in *Sorrells* v. *United States* (Dec. 19, 1932) 287 U.S. 435, 77 L.ed. 413, 53 S.Ct. 210, 86 ALR 249, which held that:

> "proof of entrapment, at any stage of the case, requires the court to stop the prosecution, direct that the indictment be quashed, and the defendant set at liberty."

The holding of the Circuit Court in the instant case and in Kivette is also in conflict with the separate opinion of Justice Frankfurter, joined by Justices Douglas, Harlan and Brennan in *Sherman* v. *United States* (May 19, 1958) 356 U.S. 369, 2 L.ed. 2d 848, 78 S.Ct. 819, in which it was said:

> "As Mr. Justice Roberts convincingly urged in the Sorrels case, such a judgment, aimed at blocking off areas of impermissible police conduct, is appropriate for the court and not for the jury."

Mr. Justice Frankfurter wisely pointed out in the last paragraph of his opinion the reasons why these are matters for the court.

We believe a reconsideration by the Court at this time will result in the adoption by the Court of the Roberts opinion in Sorrels and the Frankfurter opinion in Sherman, in which case these convictions could not stand.

2. The opinion of the Court in Sherman which was by Mr. Chief Justice Warren held that in the Sherman case "entrapment was established as a matter of law." We analyze this opinion's expression of refusal to decide the Sherman case (although the result would have been the same) on the basis of the separate opinion of Mr. Justice Roberts in the Sorrells case to rest on the fact that the question as to whether the entrapment issue should be judge or jury decided was not raised in the lower court. Such lack of question raising in the lower court is not present here.

3. The Circuit Court's opinion is in conflict, in result at least, with the opinions of the same court in *Henderson* v. *U.S.A.*, 261 F.2d 909 (December 23, 1958) and *Adams* v. *U.S.A.* (1955) 220 F.2d 297, in both

of which cases the Fifth Circuit Court concluded from the evidence that entrapment was established as a matter of law. Can such an important question be left to chance of assignment of judges to particular cases or slightly different sets of facts, or as Mr. Justice Frankfurter said in Sherman, shouldn't this Court "through the gradual evolution of explicit standards in accumulated predecents * * * do this with the degree of certainty that the wise administration of criminal justice demands?"

4. Two of these Petitioners face trial in a different Circuit for offenses based on the same facts with respect to entrapment, unless Certiorari is granted herein and their Fifth Circuit convictions reversed. Yet there are different standards prevalent by reason of conflicting opinions of the two circuits. This is because of the failure spoken of by Mr. Justice Frankfurter in Sherman of the "gradual evolution of explicit standards * * * with the degree of certainty that the wise administration of criminal justice demand."

The Fifth Circuit says as the jury was instructed in the instant case that entrapment is "lawful" or unlawful," being unlawful if it induces a person to do what he did and if defendant was ready and willing and merely awaiting propitious opportunity. (*Kivette* v. *U. S.*, infra.)

The Tenth Circuit in *Garcia* v. *U. S.* (1967) 373 F.2d 806, said through Chief Judge Murrah:

> "We must confess our inability to comprehend a 'lawful' entrapment. In our view, the accused is either entrapped or he is not entrapped. If he is entrapped he cannot be punished. * * *
>
> "If the state induces a person to do an unlawful act when he has no previous disposition to do so,

> it is not punishable, for in these circumstances, the state is particeps criminis, i.e. a partner in the crime."

This test which will be applied to two of these Petitioners in their Tenth Circuit trial omits the criteria applied to them by the Fifth Circuit as to their readiness and willingness without persuasion and whether they were merely awaiting propitious opportunity.

In *Martinez* v. *U. S.* (1967) 373 F.2d 810, the Tenth Circuit Court said:

> "*The burden is upon the government to prove beyond a reasonable doubt that entrapment did not occur.* If the facts and circumstances of the case show conclusively that the entrapment occurred, *the trial judge has a duty to find that entrapment, as a matter of law, exists in the case.* If the evidence in the case on the issue is conflicting, the issue of entrapment should be submitted to the jury." (Emphasis Ours)

We submit that this differs from and conflicts with Kivette and the opinion of the Fifth Circuit herein.

The Petitioners are entitled to be tried for offenses having the same bases in fact under the same laws, despite the fact that the things they did one day were north of the Red River in the area of the Tenth Circuit and a few days later south of the River in Texas in the area of the Fifth Circuit.

If this honorable Court agrees with the foregoing statement, then, even though it is superfluous, we respectfully point out that only by granting Certiorari herein can this right be protected.

5. This Court should consider, we submit, whether conviction procured by entrapment is in violation of the due process provision of the Fifth Amendment. That is it was stated by Judge Denman speaking for the Ninth Circuit in *Banks* v. *U.S.A.* (1957) 249 F.2d 672, at 674. This opinion also adopted the Roberts opinion in the Sorrells case. We believe this places the Ninth Circuit in conflict with the Fifth.

6. It may well be that this Court should and will desire to adopt a clarifying rule such as was suggested by the District Court of New Hampshire in *U. S.* v. *Certain Quantities of Intoxicating Liquors* (1923) 290 Fed. 824 at 826.

> "An examination of numerous cases satisfies me that the federal courts have very consistently followed the rule that one of two conditions must be present to warrant a conviction in this class of cases—either (1) reasonable suspicion on the part of the officers that the party is engaged in the commission of a crime or is about to do so; or (2) the original suggestion or initiative must have come from the perpetrator."

Neither of these elements was even alleged as to Petitioners. Nor does the Government deny, nor could it deny, that the offenses for which Petitioners were convicted were induced by the government agents. It seems to be generally understood that if the government induces a person to do an act which he otherwise had no disposition to do, he can't be punished, but these Petitioners have certainly had little success in the District Court or Court of Appeals in establishing what seem to their counsel to be their theoretically undisputed rights.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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